

RICHARD SHIRROD)	
)	
Claimant-Petitioner)	
)	
v.)	
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PACIFIC RIM ENVIRONMENTAL)	DATE ISSUED: 07/24/2012
RESOURCES, LLC)	
)	
Self-Insured)	ORDER on MOTION FOR
Employer-Respondent)	RECONSIDERATION

Claimant has timely moved for reconsideration of the Board's Decision and Order in this case, *Shirrod v. Pacific Rim Envtl. Resources*, BRB No. 11-0847 (Feb. 14, 2012). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Additionally, claimant's counsel has filed a petition requesting an attorney's fee of \$5,175 for work performed before the Board. Employer responds that claimant's motion for reconsideration should be denied and that counsel's fee petition is premature.

In his motion for reconsideration, claimant contends that the Board erred in failing to direct the administrative law judge, on remand, to recalculate his average weekly wage under Section 10(c), 33 U.S.C. §910(c), pursuant to the Board's decision in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009).¹ Specifically, claimant argues that, pursuant to *Simons*, only the weekly wage he earned while working for employer, \$800, reasonably represents his earning capacity at the time of injury and, therefore, the Board should have directed the administrative law judge to determine an average weekly wage of \$800 on remand.

¹In *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), a case arising under the Defense Base Act, the Board held that where claimant is injured while working overseas in a dangerous environment in return for higher wages under a full one-year contract, and intended to continue working in Iraq for a longer period, his average weekly wage should be based upon the earnings in that job as they reflect the full amount of the annual earnings lost due to the injury.

We reject claimant's contention and deny his motion for reconsideration. Contrary to claimant's assertion, *Simons* does not control the outcome of this case as the facts are significantly different. As the Board previously explained, the object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. See *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). The administrative law judge is afforded considerable discretion in arriving at this figure pursuant to Section 10(c). See *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Unlike the case in *Simons*, here, employer did not pay claimant higher wages to work overseas in a dangerous area and claimant was not hired under a one-year contract. See *Simons*, 43 BRBS at 137. Therefore, on the facts of this case, we decline to hold that, as a matter of law, only claimant's earnings with employer may be used to arrive at a reasonable annual earning capacity. Moreover, the Board did not dictate that the administrative law judge calculate an average weekly wage based on any particular method, but instructed him to clarify the basis of his average weekly wage calculation with reference to the evidence of record and applicable case precedent. *Shirrod*, slip op. at 4; see generally *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

We next address claimant's counsel's request for an attorney's fee for work performed before the Board. On April 3, 2012, counsel for claimant submitted an attorney's fee petition to the Board seeking a fee totaling \$5,175, representing 12.75 hours of attorney time at \$400 per hour and .50 hours of legal assistant time at \$150 per hour. Employer objected that the fee request is premature, asserting that claimant's appeal will not have been successful unless the administrative law judge, on remand, awards him compensation based on an average weekly wage greater than \$569.23. We agree with employer. The Act provides that claimant's counsel is entitled to an attorney's fee for success in review proceedings before the Board. 33 U.S.C. §928(b); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). As this case is being remanded, the degree of counsel's success before the Board, if any, has yet to be determined. Thus, as the award of a fee for services performed before the Board is premature, counsel's fee request is denied at this time. See generally *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Should counsel ultimately be successful in obtaining a greater award for claimant, he may refile his fee petition with the Board. 20 C.F.R. §802.203(c).

Accordingly, we deny claimant's motion for reconsideration and counsel's request for an attorney's fee in this appeal. 20 C.F.R. §§802.203(c), 802.409.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge